

STATE OF MICHIGAN
COURT OF APPEALS

RHONDA ROSE GILLETTE, a/k/a RHONDA
ROSE BEAN,

UNPUBLISHED
April 10, 2003

Plaintiff-Appellant,

v

THOMAS LYNN BEAN,

No. 242811
St. Clair Circuit Court
LC No. 94-001918-DM

Defendant-Appellee.

Before: Jansen, P.J. and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying her motion to change custody. We affirm.

Plaintiff and defendant were divorced in 1995. The judgment of divorce granted the parties joint legal and physical custody of their daughter (DOB 4-26-92). In September 1998 the trial court entered an order directing that the parties continue to share joint legal custody but that defendant be awarded physical custody of the child. Plaintiff was awarded parenting time, and was ordered to pay child support.

Two years later plaintiff filed a motion for change of custody. Plaintiff alleged that defendant had repeatedly frustrated her attempts to exercise parenting time, necessitating intervention by the court, that defendant had ignored the child's inadequate performance in school and had not sought treatment for the child's dyslexia, that defendant's home was not stable, and that defendant had cohabited with a number of persons since entry of the judgment of divorce. Plaintiff alleged that it would be in the child's best interests to grant her sole legal and physical custody. The trial court referred the matter to the Friend of the Court (FOC), which conducted an investigation and recommended that the motion be denied.

Plaintiff filed objections to the FOC report and requested a de novo hearing. At the hearing the evidence showed that plaintiff had been married for nearly one year, and had resided in her current home for nearly two years. Plaintiff's husband and the child got along well, but were still in the process of becoming acquainted. Plaintiff acknowledged that for a nine-month period in 1996-1997 she voluntarily absented herself from the child's life while she dealt with personal issues. The evidence showed that defendant and his girlfriend had cohabited for two and one-half years, and had lived in their current residence for approximately one year. The

child and defendant's girlfriend got along well. Defendant acknowledged that for several months in the summer of 1997 he, the child, and his former girlfriend and her child lived in a campground and a motel. Defendant indicated that these living arrangements were chosen due to family dynamics, and were not forced by financial circumstances. The Family Independence Agency investigated the campground living arrangement and took no action. The evidence showed that the child had been diagnosed with dyslexia and attention deficit disorder, and was receiving special education assistance in school. Plaintiff maintained that the child was in need of special tutoring but not medication for her condition. Defendant held the opposite view. The evidence showed that plaintiff was employed as a truck driver, and that she could arrange her schedule to enable her to return every night. Plaintiff provided insurance for the child. Defendant was self-employed as a carpenter and worked long hours at times; however, he returned home every night. Defendant carried Medicaid for the child.

The trial court denied plaintiff's motion to change custody. The trial court found that an established custodial environment for the child existed with defendant at least since September 1998. The trial court applied the statutory factors and made the following findings. Both parties loved the child. Defendant had been the primary caretaker since 1996. He followed professional recommendations regarding the child's health and educational needs. The trial court disapproved of plaintiff's plan to allow the child to make her own decisions regarding religion. Both parties were employed. Plaintiff had a stable income and provided medical care for the child. Defendant's home was stable, notwithstanding the fact that he had moved on several occasions. Plaintiff's home was stable. Moral fitness and health were not concerns for either party. The trial court gave consideration to the child's preference regarding custody. The parties needed to improve their efforts to communicate. Domestic violence was not a concern with either party. The trial court concluded that the factors addressing the length of time that the child had lived in a stable environment and the permanence of the family unit marginally favored plaintiff, but that the remainder of the factors were equal or favored defendant. The trial court found that no significant change of circumstances had occurred that would justify a change of custody.

A child custody dispute is to be resolved in the best interests of the child. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). To determine the best interests of the child, a trial court must consider the factors set out in MCL 722.23(a)-(l). Those factors include: (a) the love, affection, and emotional ties existing between the parties and the child, (b) the capacity and disposition of the parties to give the child love, affection, guidance, and religious instruction, if applicable, (c) the capacity and disposition of the parties to give the child food, clothing, medical care, and other material needs, (d) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity, (e) the permanence, as a family unit, of the existing or prospective custodial home or homes, (f) the moral fitness of the parties involved, (g) the physical and mental health of the parties involved, (h) the home, school, and community record of the child, (i) the reasonable preference of the child, if the child is of sufficient age to express a preference, (j) the willingness and ability of each party to facilitate and encourage a close relationship between the child and the other party, (k) the existence of domestic violence, whether directed against or witnessed by the child, and (l) any other factor considered by the court to be relevant to the particular dispute. The trial court must consider and explicitly state its findings and conclusions as to each factor. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The trial court need not give equal weight to all the factors, but may

consider the relative weight of the factors as appropriate to the circumstances. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998).

A custody award may be modified on a showing of proper cause or change of circumstances which establishes that modification is in the child's best interests. MCL 722.27(1)(c); *Foskett, supra*, 5. If a modification of custody would change the established custodial environment of the child, the moving party must show by clear and convincing evidence that the change is in the child's best interests. *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). A custodial environment is established if over an appreciable length of time the child naturally looks to the custodian for guidance, discipline, the necessities of life, and comfort. The age of the child, the physical environment, and the inclination of the custodian and the child to permanency should also be considered. MCL 722.27(1)(c). Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

Three standards of review apply in custody cases. MCL 722.28. We review a trial court's findings of fact under the great weight of the evidence standard. A trial court's findings on the existence of an established custodial environment, as well as each custody factor, will be affirmed unless the evidence clearly preponderates in the opposite direction. We review a trial court's discretionary rulings, including custody decisions, for an abuse of discretion, and questions of law for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Phillips, supra*, 20.

Plaintiff argues that the trial court abused its discretion by denying her motion to change custody. Initially, plaintiff contends that the trial court's finding that the child's established custodial environment was with defendant was erroneous. Furthermore, plaintiff asserts that the trial court's findings on various best interest factors were against the great weight of the evidence.

We affirm the trial court's order denying plaintiff's motion to change custody. Initially, we conclude that the trial court's finding that the child had an established custodial environment with defendant was not against the great weight of the evidence. *Id.* The 1995 judgment of divorce granted the parties joint legal and physical custody of the child. The evidence showed that at some point in 1996 plaintiff relinquished physical custody of the child to defendant, and absented herself from the child's life for approximately nine months. The child continued to live with defendant after plaintiff reappeared, and in September 1998 the trial court entered an order awarding defendant physical custody of the child. Plaintiff had parenting time, including extended time during the summers, and took charge of arranging most of the child's medical care; however, the evidence showed that defendant provided for the bulk of the child's material needs and schooling. The trial court's finding that the child had an established custodial environment with defendant since September 1998 was not against the great weight of the evidence. *Mogle, supra; Phillips, supra.*

Plaintiff's assertion that the trial court's findings on various best interest factors were against the great weight of the evidence is without merit. The finding that defendant was the child's primary caretaker was amply supported by the evidence. Plaintiff's assertion that defendant was not forthright in reporting his income is unsubstantiated. The evidence showed

that while plaintiff likely earned more than defendant, defendant was able to provide the child with adequate food, clothing, medical care via Medicaid, and other material needs. The fact that plaintiff likely had an income greater than defendant does not mandate a finding that this factor favored plaintiff. *LaFleche v Ybarra*, 242 Mich App 692, 701; 619 NW2d 738 (2000). The evidence showed that defendant's housing situation had stabilized in the two and one-half years prior to the hearing. The trial court's finding that this factor only marginally favored plaintiff was not against the great weight of the evidence. The evidence showed that on occasion defendant frustrated plaintiff's attempts to exercise parenting time; however, the trial court's finding that each party needed to improve communication and cooperation was not against the great weight of the evidence.

The child had an established custodial environment with defendant; therefore, plaintiff was required to show by clear and convincing evidence that a change of custody was in the child's best interests. MCL 722.27(1)(c); *Phillips, supra*, 21. The trial court's conclusion that only two of the best interest factors marginally favored plaintiff and that the remaining factors were equal or favored defendant was not against the great weight of the evidence. *Id.*, 20. The trial court did not abuse its discretion by denying plaintiff's motion to change custody. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood